



DATE: September 1, 2004

TO: NR 115 Advisory Committee Members

FROM: Carmen Wagner, WT/2

SUBJECT: August Meeting Review

Hello – I want to thank everyone for the good discussion we had on Tuesday, August 24, about the second draft of changes to NR115. This memo provides a brief review of the items discussed at the meeting and is a reminder of upcoming events.

Upcoming Dates:

Sept. 13, 2004: Written comments resulting from Aug. 24 meeting due.

Oct. 26, 2004: Next Advisory Committee meeting. The goal is to provide a comprehensive review of the third draft of changes to NR115. Changes between the second and third draft be based on Advisory Committee recommendations and comments from the August meeting.

Nov. 16, 2004: Final Advisory Committee meeting, if needed.

Jan. 26, 2005: Request approval from Natural Resources Board for approval for public hearings

Spring 2005: Schedule public hearings around the state on proposed changes to Chapter NR 115.

Review of August Meeting:

The following issues were discussed at the August 24 meeting. This is not a comprehensive review of the meeting and does not include any written comments provided after the meeting. For the October meeting, a summary of comments, included written comments from Advisory Committee members, will be prepared. The summary will include Department responses explaining resulting changes made for the third draft.

Goals of Chapter NR 115 Revision:

Russ Rasmussen summarized the goals that the Department of Natural Resources seeks to achieve by revising chapter NR 115:

1. Protecting water quality (one of the Department's most important missions).
2. Preserving, or reestablishing, adequate fish and wildlife habitat.
3. Protecting the public interest in navigable waters.
4. Providing for reasonable use of property within the shoreland area by property owners.

NR 115.01 Purpose

- Rather than having an individual purpose section in each section, could they be consolidated into this section?

NR 115.02 Applicability

NR 115.03 Definitions

- Is it possible to better clarify how the definitions of “ordinary maintenance and repair”, “reconstruction”, “structural alteration” and “structural component” apply to accessory structures that are not buildings? If not a definition issue, can the nonconforming and mitigation provisions better explain how accessory structures, that are not buildings, are impacted?
- Can a clearer distinction be made between the “shoreland buffer area”, “shoreland setback area”, “shorelands” and “shoreland area”? They get to be confusing and seem to be used interchangeably.
- Can a different term be used other than “substandard lot” that does not have a negative connotation?

NR 115.05 Shoreland zoning districts

NR 115.07 Shoreland-wetland zoning

NR 115.09 Land division review

(1) Purpose

- Combine this purpose section and others into one location rather than repeating it in each section?

(2) General

- Make the threshold lot size that requires review 5 acres instead of 1.5 acres.
- Make the threshold number of lots that require review “5 or more”, consistent with ch. 236, Wis. Stats, rather than 1 lot.

(4) Substandard lots in common ownership

- Does this apply differently to lots if they are developed vs. undeveloped? It is not clear.
- How will this affect new lots that may be deemed “substandard” based on the new standard to measure lot width?
- Why are sewerred lots treated differently than unsewerred lots?
- Why use “July 1, 2004” as the magic date rather than the date of the first public hearing on changes to NR 115 or the effective date of the code?
- Does this provision make sense when if someone owns multiple substandard lots, all the substandard lots may be built on, but not sold separately?

(5) Keyhole Development

- Does this apply the same to single-family lots and multiple-family lots that use a keyhole lot to access a navigable water? It appears to, but three homes may have less impact than 3 apartments. Clarification is needed.
- The requirement for additional frontage for each additional inland lot should be 50 feet or more.

- Is it really necessary to include examples of other conditions that a county may impose on keyhole lots? Why not delete the second to the last sentence in s. NR 115.09 (5)(intro.)?
- If three inland lots use one lot for access, it needs to be 150 feet wide, but three families who live elsewhere can own one lot, and it only needs to 100 feet wide. Does this make any sense? It appears to be regulating where you can live.
- Shouldn't this provision only apply to lots where access to inland lots has been "deeded"? That is how Bayfield County regulates "keyhole" developments.
- The proposal limits the construction or placement of any structure on the keyhole lot. Should structures that are "exempt" or "permissible" be allowed? Walkways, stairways and other structures needed for access should be allowed.

NR 115.11 Minimum lot size

(2) General

- Rather than measuring at the ordinary high-water mark (OHWM) and 75-feet from the OHWM, could it rather read to measure at the OHWM and the OHWM setback, in case counties have adopted a larger setback?
- Could the setback measurement method start on the date the code becomes effective so existing lots that were measured in a different way are not deemed "substandard"?

(3) Residential structures

- May the county permit the placement or construction of a structure, other than a residence, on a lot that does not meet the minimum lot size? The introduction only mentions residences.
- How does the lot size standard apply to hotels, motels, resorts, time-shares, condominiums or other rental-type properties? When is a structure a "residential structure" or an "other use"?

(4) Campgrounds

- Are "storage sheds, decks, and screened porches" excepted with legal nonconforming structures or are they prohibited at a campground site unless the site meets minimum lot size requirements?
- Russ Rasmussen informed the Advisory Committee members that he has contacted the Wisconsin Association of Campground Owners and plans to meet with them to discuss these proposed provisions before the next Advisory Committee meeting.

(5) Other uses

- Are time-shares units a type of residential structure or an "other use"? What about condominiums that are rented? Please provide more clarification.

(6) Planned unit development

- Why isn't there a break in the lot width as well as the lot size for planned unit developments?

(7) Substandard lots

- Can a different term be used other than "nonconforming" or "substandard" for this type of lot? What about "legal substandard lot"?

- There are also concerns about lots that were previously considered conforming, but have a lot width that will now be nonconforming because of proposed rule changes that require lot width to be measured in a different way.

NR 115.13 Shoreland buffers – structural setback standards

(2) General

- Why does this proposal reward counties who have historically violated the current standard of measuring the OHWM setback to the nearest point of the structure? By providing an option to measure to the foundation, rather than the roof overhang, this just continues to reward them, rather than making them do the right thing. Go back to requiring the measurement to the nearest point of the structure.
- Can't the rule require measuring to roof overhangs for buildings constructed after a certain date, but not measure to roof overhangs for existing structures?

(3) Exempt structures

- A note should be added that says that counties can not be more restrictive than what the listed statutory provisions allow for exempt structures.
- Why are fishing rafts required to be in the viewing and access corridor?

(4) Permissible structures

- It seems that allowing counties to allow these permissible structures without a permit conflicts with the administrative provision to require counties to have a permit system for all new development. Can this be clarified?
- The consensus of the Advisory Committee was that new boathouses should not be exempt from shoreland setback requirements. Why are wet boathouses listed as permissible structures in this draft? New wet boathouses are prohibited by statute with certain exceptions. Can counties be less restrictive than ch. 30 and ch. 31, Stats., ? Can counties prohibit wet boathouses that state statute would allow?
- For stairways, what if you need a landing at less than 12 feet? The UDC requires landings to be no more 12 feet apart, and allows the landings to be closer together if needed. Please rectify.
- Can political signs or for sale signs be prohibited? Wasn't there a new court decision on signs in Waukesha County?
- It seems that 115% as a threshold for the cost of water quality improvement structures is really low. What about 150%?
- How is "natural materials" defined? Is concrete natural? – it's sand, rock and water. Is wood natural if it is painted pink? Should a structure that is covered with natural materials be allowed, even if non-natural materials are used underneath? Please define the term or use a different standard.

- Requiring aboveground marine fuel tanks to not be visible from the water seems a tough standard. How about just requiring screening? (that is, remove the words “by vegetation so that they are not visible from the water.”)
 - Throughout this document, “parcel”, “lot” and “property” seem to be used interchangeably. Please be consistent in their use.
 - Should there be cross-reference to the shoreland buffer vegetation standards in the structural standards for utilities?
 - Are 7-foot high permanent fences to prevent deer damage to vegetation allowed? If not, can they be allowed if they are not readily visible from the water?
- (5) Setback reduction process
- Could the 1,500 square foot footprint limit apply to a residence and garage, regardless of whether or not the garage is attached?

NR 115.15 Shoreland buffers – vegetation standards

- (5) Agricultural practices and farm drainage ditches
- What are horticultural facilities? Does that term need to be defined?

(10) Road and driveway maintenance activities

- The references to chs. 80 and 81 will need to be changed to ch. 82, which takes effect on January 1, 2005.

NR 115.17 Land disturbing activities

NR 115.19 Nonconforming uses and structures

- (1) Nonconforming uses
- In the statutes, the term “prohibited trade or industry” is used. Why does this code use “nonconforming trade or industry”?
- (2) Nonconforming accessory structures
- More clarification is needed on how these provisions affect structures that are not buildings. What is the difference between “ordinary maintenance and repair” and “structural alteration” for structures other than buildings? Is replacing a tread on a stairway ordinary maintenance or a structural alteration? What about changes to retaining walls? A certain threshold should be met before mitigation is triggered. Can we use the criteria that the work will “extend the life of the structure” to determine if mitigation is required?
 - Is the concept of rough proportionality of mitigation to the proposed improvements still in this draft? DNR staff explanation: Section 115.21 has been drafted to create mitigation tiers that are intended to make the mitigation proportional to the proposed changes.
 - Does the term “ordinary maintenance and repair” include foundation repair or replacement? This needs to be clarified.

- Does the statutory provision s. 59.692 (1s), Wis. Stats., apply to accessory structures if they are burnt down? Is a reference needed to that section?
- (3) Nonconforming principal structures
- Is there statutory authority for the DNR to add specific requirements for the regulation of nonconforming structures to ch. NR 115?
 - Is a roof overhang allowed when replacing a flat roof with a pitched roof, for counties that measure the ordinary high-water mark setback to roof overhangs? If so, how much of an overhang? Such overhangs need to be clearly exempt from the setback requirements.
 - Is a reference to s. 59.692 (1s), Wis. Stats., required?
 - Under reconstruction provision, can a pre-existing structure be reconstructed in a different location than it is currently located in? The rule needs to be clarified to make it clear that if an owner wants to reconstruct, but finds that the foundation must be replaced, that means that the building must be relocated to a conforming location if the original foundation was within 50 feet of the ordinary high-water mark.
 - Does state statute allow counties to prohibit the expansion of nonconforming structures if the “50% rule” is not applied?
 - It was suggested that the Department labeled unused section numbers in ch. NR 115 as “Reserved.”

NR 115.21 Mitigation requirements

(2) General

- It is not clear whether this applies only to nonconforming structures or all structures. Please be clearer about when mitigation is required.
- For condos and other multiple-unit developments, why is 300 feet used as the threshold? Why not make it 200 feet since a typical 20,000 square foot lot with 100 feet of frontage will be 200 feet deep?
- Is s. NR 115.21 (2)(b) clear enough that it applies to specified changes to a single dwelling unit?
- Requiring the submission of a vegetative buffer plan will be a problem because the individual condo owner will have to obtain the approval of the entire condominium association before they can propose a change to their unit.
- Section NR 115.21 (2)(b) 2. should be amended to provide that a new plan doesn’t need to be submitted if the county has already approved of a comprehensive vegetative buffer plan for that same condominium property.

(3) Accessory structures

- “Visually inconspicuous” is too vague and difficult to enforce. Isn’t it unfair to prohibit visually conspicuous structures on the land when brightly colored boats and other structures are allowed on the water and the ice? Shouldn’t the provision at least mention that the zoning administrator’s decision as to what is “visually inconspicuous” can be appealed? It isn’t clear whether “to be visually inconspicuous” modifies “screened with vegetation” or “constructed with natural materials”?

Shouldn't "visually inconspicuous" guidelines similar to forestry's best management practices be developed?

- Why is the variance process mentioned only in some sections of NR 115? Should the possibility of obtaining a variance be mentioned in every section? Why not add a cross-reference in all sections to a general variance provision in s. NR 115.23?
- A definition of "natural materials" is needed. Shouldn't the term be limited to wood and other materials that are unpainted?

(4) Principal structures

- More subheadings may make this section easier to understand.
- Compliance with ch. 83 is achieved when the sanitary permit is issued. Timing may make it difficult to complete the upgrading of the private onsite wastewater treatment system before the principal structure is constructed, expanded or reconstructed. Section NR 115.21 (4)(b) 2. should be amended to require that a permit for the private onsite wastewater treatment system must be issued before the principal structure is constructed, expanded or reconstructed.
- Control is required for 80% of the post-construction runoff, but 80% of what? A 100-year storm? A 25-year storm?
- Does s. NR 115.21 require a separate permit from the county for mitigation?
- Do the requirements in this mitigation section mesh with the erosion control requirements of ch. NR 216?
- Why is the land disturbance acreage used as a threshold? It appears that runoff control should be required regardless of whether any land is disturbed, so why not get rid of the acreage distinction? Shouldn't storm water runoff be required to be controlled if a nonconforming structure is reconstructed but no land disturbing activities are conducted?
- Can other suitably trained professionals submit documentation rather than just engineers or landscape architects?
- Instead of just saying "structure", why not repeat "principal structure" so it clear what is being talked about?
- What about the proposal to limit impervious surfaces to no more than 20% of the lot?
- It is not clear that the mitigation section applies to all construction projects.
- If a principal structure is being reconstructed closer than 50 feet from the OHWM, should some sort of buffer be required rather than just removing the nonconforming accessory structures? It seems this is when it is most advantageous to have a buffer. Why not require that one-half of the distance to the ordinary high-water mark must be preserved or restored?

(6) Mitigation documentation

- Rather than requiring property owners to record the affidavit, it may be easier to require the county to prepare the affidavit and record it, after the property owner has paid a fee, signed the affidavit and submitted it to the county.
- The affidavit is required to be recorded in 14 days – after what? The permit issuance? Completion of the project? Please clarify.

NR 115.23 Adoption of administrative and enforcement provisions

- Define what “new development” requires a permit. Does razing, burying or removing a structure require a permit? Do land disturbing activities require a permit? Does the construction of an “exempted” or “permissible” structure in the OHWM setback area require a permit?
- Board findings of fact for variance and conditional use applications should clearly document how a project meets the applicable standards.
- By adding language to the variance section that only allows the minimum relief necessary to avoid unnecessary hardship, is that creating a new standard beyond what the statutes allow? Can this be placed in an administrative code? Shouldn’t it be included in a statute?
- How can DNR prohibit counties from using the special exception process instead of the variance process?
- How long is a county required to keep a complete record of BOA and planning and zoning committee proceedings? What does the public records law require?
- \$1,000 maximum forfeiture seems too small. Some developers will look at small forfeitures as just a cost of doing business. When do forfeitures start to run? What if a violation cannot be abated in one day? Is a county required to continue fining if a good faith effort is being made to correct the violation?
- Should enforcement of violations include a requirement for restoration and compliance as well as forfeitures? What about an additional penalty for repeat offenders?

NR 115.25 Department duties

(4) Monitoring zoning decisions

- Can “comment on” be added to the requirement that the department review decisions on granting conditional uses, variances and appeals? Could the department be prohibited from appealing a decision if they do not comment on it?